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Law Department
Consolidated Edison Company of New York, Inc.
4 Irving Place, New York, N.Y. 10003

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JUN 27 1997

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June 26, 1997

Office of the Secretary
Federal Communications Commission
1919 M. Street, N.W., Room 222
Washington, D.C. 20554

Re: Matter of Amendment of Rules and Policies
Governing Pole Attachments
Docket No. 97-98

To Whom It May Concern:

Please find enclosed for filing in the above proceeding the original and 12 copies of the Comments of Consolidated Edison Company of New York, Inc.

Also enclosed is a copy of the foregoing document and a self-addressed, stamped envelope. Kindly date stamp this copy and return it to me in the envelope provided. Thank you for your cooperation.

Very truly yours,

Martin F. Heslin
(me)

Enclosures

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

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JUN 27 1997

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In the Matter of :
: CC Docket No. 97-98
Amendment of Rules and Policies :
Governing Pole Attachments :
-----X

COMMENTS OF CONSOLIDATED EDISON
COMPANY OF NEW YORK, INC.

Consolidated Edison Company of New York, Inc. ("Con Edison" or the "Company") submits these comments in response to the Notice of Proposed Rulemaking ("NPRM") issued by Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceeding on March 14, 1997. The NPRM seeks comment on a proposed methodology that will determine the maximum just and reasonable rates utilities may charge cable systems and telecommunications providers for their use of utility conduit. The NPRM also proposes certain changes in the Commission's existing formula for calculating pole attachment rates. Finally, the NPRM proposes amending the formula for calculating pole attachment rates to reflect the Commission's current accounting rules applicable to telephone companies.

Con Edison is a New York State electric, gas and steam utility serving approximately three million customers in New York City and Westchester County. Its service area is relatively small area-wise (about 660 square miles), but its territory encompasses one of the most congested urban areas in the world. Con Edison's customers include a multitude of hospitals, prisons, and airports, the world's financial center, many high-technology companies,

as well as the largest subway transportation system in the world. Continued service reliability is critically important to Con Edison's customers and to the Company's success.

The Company's electric distribution system consists of 55 area substations supplying 74 secondary networks and radial 27kV, 13kV, and 4kV load. Approximately 86 percent of the 24,336,882 kVA distribution transformer capacity is underground and 14 percent is overhead. The underground distribution system includes 252,336 manholes and boxes, 22,147 conduit miles of duct, and 31,969 underground transformers. The Manhattan service area distribution system, covering 23 square miles, is all underground and supplies load entirely via secondary networks; it includes 59,001 manholes and boxes, 5,778 conduit miles of duct, and 8,773 underground transformers.

While Con Edison's underground electric distribution system is very large and complex in itself, this complexity is compounded by the fact that this system occupies the most congested subsurface infrastructure network in the world. Con Edison's electric system shares the subsurface with a vast array of structures including gas, steam, communications, cable, water, and transit facilities. The complexity of Con Edison's electric distribution system together with the environment in which this system operates results in unique safety, reliability, and engineering concerns when a party seeks to attach to the Company's conduit system.

Summary of Comments

Con Edison believes that market rates freely negotiated between conduit owners and parties seeking to attach to ducts is the best way to determine the charges for use of conduit facilities. New York City's infrastructure is sufficiently diverse to afford a number of viable alternatives to use of electric system duct for telecommunications and cable

attachments. Con Edison submits these comments in the event the Commission determines to adopt a formulaic, accounting methodology to allocate costs.

The proposed rate for use of duct does not reflect all of the Company's costs in making its system available to third parties. Conduit use agreements will have to reflect operational costs that are directly attributable to the licensee's¹ use of a particular duct. Many of these costs can be reflected as make-ready costs consistent with practices established for pole attachments. Other costs will have to be determined and collected on an on-going basis. The complexity of monitoring and accommodating duct work where non-utility workers, unfamiliar with the existing system and its unique characteristics, would work next to live electric cables will entail significant costs. Providing and coordinating access to ducts and maintaining reliability is labor intensive. During both initial construction and during on-going inspections and maintenance programs, utility employees would need to monitor all work, and provide support services, such as environmental testing and "flushing out" manholes of liquids and accumulated debris. These job-specific costs will have to be accounted for and collected in addition to the occupancy rate established by the Commission's conduit rate formula.

In an electric conduit system, an attachment occupies an entire duct. Electric distribution facilities cannot share duct space with a telecommunications attachment. Once a telecommunications attachment is placed in a duct, that duct cannot be used for electric distribution facilities. Consequently, the "half-duct" convention proposed in the NPRM should not be adopted for electric conduit attachment rates.

¹ Use of the word "licensee" in these comments refers to a telecommunications carrier or cable system operator that has entered into an agreement with a conduit owner for attachment to a duct.

Attaching parties should be required to install “inner duct” at the time of the initial installation of a communication or cable attachment. This will create several pathways within the duct that can accommodate future attachments and make efficient use of the duct. The cost of the inner duct installation should be included in the make-ready charges paid for the initial attachment in the duct. Thereafter, the make-ready charges for an additional attachment in the duct should include a charge to recover a pro-rata share of the original inner duct installation charges. This charge would be paid to the owners of the existing attachments in the duct.

If more than one telecommunications carrier or cable system operator maintains facilities in the same duct, they should share the costs of occupancy. The conduit attachment charge for use of the duct should be divided equally among the occupants.

Because a duct attachment license is open ended, there will likely be cases in which the Company’s duct reservation plan is unable to reasonably anticipate circumstances that require the use of an unreserved duct that is no longer available because it is licensed for an attachment. A utility’s conduit attachment rate should include an incremental charge that would be used to cover the utility’s conduit construction costs necessitated by circumstances not reasonably anticipated under the utility’s reserved space plan.

The Commission’s pole height and usable space presumptions should not be changed. The Commission’s rules allow individual utilities sufficient flexibility to propose variances from these presumptions based on their particular circumstances.

Con Edison supports using a uniform rate for utilities in states that no longer specify a rate of return. A uniform rate will promote efficient calculation of attachment rates and will reduce potential disputes over rate calculations. In view of the transition to

competition that is underway in the electric industry, and in view of the great uncertainty about the future regulatory and legal framework of the electric utility industry, the use of an 11.25 percent return on capital appears reasonable.

Comments on Conduit Attachment Issues

A. Physical limitations that would affect the rate for duct use by telecommunication facilities

The percentage of an electric duct occupied by a telecommunications or cable facility is 100 percent.

In paragraph 44, the NPRM discusses the portion of duct space occupied by an attachment. The NPRM begins this discussion by noting that 47 U.S.C. §224 (d)(1) states that the rate for a duct attachment may be based on the “percentage of the total duct or conduit capacity which is occupied by the . . . attachment.” The NPRM concludes from this that “usable space can be estimated based on the number of ducts or the portion of a duct that an attachment occupies.” To avoid the controversy that “measuring the actual portion of duct space occupied by an attachment” would engender, the NPRM proposes a “half-duct methodology” under which an attachment would be deemed to occupy one half of the duct.

In an electric underground conduit system, an attachment occupies an entire duct. Electric distribution facilities cannot share duct space with a telecommunications attachment.² Once a telecommunications attachment is placed in a duct, that duct cannot be used for electric distribution facilities. Accordingly, the attachment occupies 100

² The term “telecommunications attachment” includes cable system attachment for purposes of these comments.

percent of the duct that it uses, and the conduit attachment rate should reflect use of the entire duct.

Electric distribution facilities cannot share duct space with a telecommunications attachment. To begin with, the National Electric Safety Code (“NESC”) precludes dual use of a duct by electric supply and communications cables. Subdivision A(6) of NESC Section 34, Rule 341, (entitled “Cable in Underground Structures -- Installation,”) states:

Supply, control, and communication cables shall not be installed in the same duct unless the cables are maintained or operated by the same utility.³

A major concern underlying this rule is that stray voltages from a fault on the electric supply cable can be transmitted to a communications cable in a common duct. This poses a threat to the integrity of the communications cable and a threat to the safety of workers maintaining the communication cable at the manhole.

Moreover, there is another very practical reason why electric supply and communication cable cannot share the same duct. It is very difficult to pull a second cable through an occupied duct without damaging the existing cable. This likelihood of damage to the first cable makes it infeasible to install communication and electric supply cable in the same duct.

The “half-duct” methodology proposed in the NPRM is entirely inappropriate for application to telecommunications cable in electric system duct. The NPRM states that the Massachusetts Department of Public Utilities (“MDPU”) found this methodology to be a reasonable approach in a case involving a cable operator’s use of telephone system duct.

³ In paragraph 1151 of the FCC’s First Report and Order in Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, FCC 96-325, August 8, 1996, 11 FCC

Con Edison takes no position as to whether this is a reasonable approach where telecommunication and cable facilities can share a duct. However, it is an unsuitable approach where electric supply and communications cable cannot coexist in the same duct.

Application of the “usable space” approach adopted for pole attachments does not work for duct attachments. Con Edison has long-standing joint-use pole agreements with NYNEX because joint use of poles is feasible. Con Edison does not have “duct sharing” agreements with the telephone company because electric and communications “duct sharing” is not feasible.

The proposal to include a half-duct adjustment in the FCC’s conduit rate formula for electric conduit attachment rates should not be adopted. The rate for a communications or cable duct attachment should not be adjusted to reflect partial use of the duct. These facilities occupy 100 percent of the electric duct, and the rate should reflect full occupancy.

Make-ready charges for a duct attachment should include the cost to install inner duct.

Installation of “inner duct” at the time of the initial installation of a communication or cable attachment creates several pathways within the duct that can accommodate future attachments.⁴ Once an attachment occupies a duct, installation of inner duct to allow for additional attachments in the duct is impractical because of the potential for damage to the existing attachment.

Rcd 15499, the Commission states that “a utility may continue to rely on such codes as the NESC to prescribe standards with respect to capacity, safety, reliability, and general engineering principles.”

⁴ “Inner duct” is narrow diameter tubing that can accommodate fiber optic cable. Several inner ducts can ordinarily be installed in a duct.

Creation of additional attachment capacity in a duct addresses a potential problem created in paragraph 1161 of the FCC's First Report and Order in Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, FCC 96-325, August 8, 1996, 11 FCC Rcd 15499 ("TA-96 First Report and Order"). In paragraph 1161, the FCC requires a utility to accommodate requests for access by rearranging existing facilities to increase capacity. The FCC uses the example of subdividing a duct into several smaller ducts. The utility may recover this expense through make-ready charges collected from the party whose needs caused the rearrangement of facilities. However, as discussed above, if a duct is not subdivided at the time of the initial attachment, it will ordinarily not be practical to subdivide it at a later time to accommodate future attachments. Consequently, inner duct should be installed at the time of the initial attachment to accommodate future attachments.

The cost of the inner duct installation should be included in the make-ready charges paid for the initial attachment in the duct. Thereafter, the make-ready charges for an additional attachment in the duct should include a charge to recover a pro rata share of the original inner duct installation charges. This charge would be paid to the owners of the existing attachments in the duct.

Creating additional attachment capacity in a duct also reduces inequities that could arise from the utility's exercise of the rights, granted to it under paragraph 1169 of the TA-96 First Order and Report, to recover reserved conduit space. For example, in a three duct conduit, a utility may use one duct, maintain a second as a reserve, and license the third for an attachment. A second licensee would have to use the reserved duct if the duct containing the existing attachment were not subdivided to accommodate additional

attachments. If the utility were required at some future time to recover the reserved duct, the burden of leaving the reserved duct or paying for the installation of a new duct would fall on the second licensee. The first licensee would have avoided sharing this burden merely because its attachment came first in time.

Multiple telecommunications occupants of a duct should share the costs of occupancy.

If more than one telecommunications carrier or cable system operator maintains facilities in the same duct, they should share the costs of occupancy. The conduit attachment charge for use of the duct should be divided equally among the occupants. (In such case, the utility that owns the duct should be permitted to add an administrative fee to the conduit attachment charge to reflect additional administrative costs related to multiple duct occupancy.)⁵

Permitting joint occupants of duct to share the costs of occupancy will promote efficient use of duct space. If occupancy costs are lower in a joint use duct, licensees are more likely to use such duct rather than requesting that a utility make a second duct available for use.

Conduit attachment rates should include a charge to cover conduit construction in circumstances not reasonably anticipated under a utility's reserved space plan.

For a conduit system as complex as Con Edison's, it is extremely difficult to anticipate all circumstances that will result in the future need to use spare duct. Nevertheless, paragraph 1169 of the TA-96 First Report and Order requires that duct space be reserved in accordance with a "bona fide development plan that reasonably and specifically projects a need for space." The planning process to develop a plan necessarily

⁵ As discussed previously, the original licensee also would be able to recover a portion of its costs of installing inner duct to accommodate multiple attachments in the duct.

becomes more complex and uncertain the further out in time that it is extended. Because a duct attachment license is open ended, there will likely be cases in which the Company's duct reservation plan was unable to reasonably anticipate circumstances that require the use of an unreserved duct that is no longer available because it is licensed for an attachment.

Under these circumstances, it would be onerous to impose the cost of a new duct on utility ratepayers who have already borne the cost of the unreserved duct that would have been available were it not for the attachment license. On the other hand, it would also be onerous to require the particular licensee of the duct to vacate the duct or pay the cost of a new duct. When the licensee took occupancy, it did not take the risk of attaching in a "reserved" duct. An equitable solution would be the creation of a general fund from conduit attachment charges that could be used by the utility to cover the conduit construction costs in circumstances not reasonably anticipated under a utility's reserved space plan. One approach could be to include an incremental charge in a utility's conduit attachment rates to be paid by all licensee's of the utility's duct.

An incremental charge paid by all duct licensees would be equitable. All duct licensees would share responsibility for the risk that is caused by their collective, long-term use of the utility's conduit system. Planning projections cannot accommodate the inevitable contingencies and uncertainties inherent in the extended horizons presented by open-ended licenses.

Assurance that utilities will be reimbursed for the cost of duct construction that could not be reasonably anticipated would mitigate what otherwise might be an inclination to create an unnecessarily conservative duct reservation plan. This will reduce disputes

over utilities' reservation plans, decrease FCC involvement in such disputes, and most importantly, by tending to reduce reserved space, make more duct space available for competitive opportunities.

The charge would not be applicable to duct licensees who are using reserved space. Because these licensees have already undertaken the risk of future costs related to future utility need for their duct, the fund created by the charge is not needed to reimburse the utility for such costs.

B. Conduit rate formula

Adjustment for non-conduit investment.

Paragraph 42 of the NPRM states that for electric companies, the investment in Accounts 367 (Underground Conductor and Devices) and 369 (Services) includes non-conduit investment that should be eliminated from the calculation of the net cost of conduit. Con Edison agrees that a portion of the investment in these accounts should be eliminated from the calculation by use of an adjustment factor applicable to each utility.

Account 367 is comprised of cable and associated devices; no portion of the account relates to conduit structure. None of Account 367 should be included in the calculation of the net cost of conduit.

Account 369 includes both cable with related equipment and conduit and manhole structures. Account 369 should be adjusted to remove the investment for cable and related equipment. For Con Edison, the adjustment factor, based on the ratio of conduit and manhole structures investment to the total investment in Account 369 is .36.

Account 366 also includes conduit and manhole structures and non-related equipment. Account 366 should be adjusted to remove the non-related investment. For

Con Edison, the adjustment factor, based on the ratio of conduit and manhole structures investment to the total investment in Account 366 is .84. Appendix “A” to these comments show the calculations used to arrive at these adjustment factors.

Comments on Pole Attachment Issues

A. Pole Attachment Rate Methodology

Pole Height and Usable Space Presumption

In paragraph 18 of the NPRM, the FCC seeks comment on whether the Commission’s current pole height and usable space presumptions are still applicable. Con Edison believes that the FCC should continue its presumption -- derived from the use of 35 and 40 foot poles for attachments -- that there is 13.5 feet of usable space on a pole.

The sponsors of the Whitepaper discussed in paragraphs 17 and 18 of the NPRM propose an increase in the presumptive pole height to an average of 40 feet. The sponsors assert that the average pole height has increased to 40 feet and claim that this warrants a calculation of usable space based on use of a presumptive 40 foot pole for attachments. Con Edison disagrees that the increase in the average pole height warrants the calculation of usable space based on the presumptive use of a 40 foot pole.

In the FCC’s Second Report and Order in Matter of the Adoption of Rules for the Regulation of Cable Television Pole Attachments, FCC No. 78-144, May 23, 1979, 72 FCC 2d 59 (1979) (“CATV Second Report and Order”), the Commission did not rely on an average pole height to calculate usable space. The FCC looked at the height of the poles primarily used for attachments and the amount of usable space on those poles. The Commission stated (*id.*, at 69):

[T]here was a consensus that the most commonly used poles are 35 and 40 feet high, with usable spaces of 11 and 16 feet, respectively . . . we . . . will permit utilities the option of assigning the arithmetic average of the usable space of 11 and 16 feet, viz., 13.5 feet, as the amount of usable space per pole for those poles used for CATV attachments. We believe that this figure represents a reasonable assignment of usable space regardless of pole height and will better serve Congress' intent that the Commission develop "a flexible program . . . [that is] simple and expeditious."

A utility's average pole height is based on a utility's entire population of poles. Many of the pole heights included in that inventory are not suited for attachments. The Commission's preference for using the size of poles most commonly used for attachments is better suited for determining the usable space on the poles that are actually used for attachments.

In the CATV Second Report and Order, the FCC observed that many utilities informed it that they also use 45 foot poles for attachments. It stated, "Most other parties reported that they rely primarily on 35 foot poles with 11.5 feet of usable space, and 40 and 45 foot poles with 16 feet of usable space" (*id.*, at 68). The Commission, nevertheless, chose to use 35 and 40 foot poles to determine usable space.

In its Memorandum and Order addressing petitions seeking reconsideration of the CATV Second Report and Order (77 FCC 2d 187), the Commission stated that the 13.5 foot usable space presumption (*id.*, at 191-92)

does not, however, preclude the utility from submitting the actual usable space per pole if it so desires, nor conversely, preclude the cable company from rebutting the 13.5 foot figure. . . Moreover, we have built enough flexibility into our procedures so

that a utility may present its own weighted average if its usage differs significantly from our 13.5 feet.

The Whitepaper sponsors have made no showing that the use of 45 foot poles has increased nationwide so as to warrant the addition of a 45 foot pole as the third leg of the Commission's calculation. To the extent that any of the Whitepaper sponsors believe that the weighted average of its poles presents a result significantly different from the 13.5 foot presumption, it may present that result to the Commission for use in its attachment rate.

Rate of Return

Paragraph 37 of the NPRM invites comment on the rate of return that should be used in the pole attachment formula for utilities that no longer regulate on a rate of return basis.⁶ The NPRM asks for comment on whether the Commission should use the 11.25% rate of return that it has adopted for telephone companies in the Accounting Safeguards under the Telecommunications Act of 1996 proceeding.

Con Edison supports using a uniform rate for utilities in states that no longer specify a rate of return. A uniform rate will promote efficient calculation of attachment rates and will reduce potential disputes over rate calculations. A uniform rate would better serve Congress' intent that the Commission develop "a flexible program . . . [that is] simple and expeditious" (S. Rep. No. 95-580, 95th Cong., 1st Sess. 21-22 (1977)). The forms of incentive-based regulation that may be implemented in place of rate-of-return regulation are varied and could lead to confusion and controversy if the Commission were to implement rules requiring individual utilities to determine their rate of return for use in the attachment formula.

⁶ Inasmuch as the conduit attachment formula proposed in the NPRM is derived from the pole attachment formula, the same rate of return also should be used in the conduit attachment formula.

In view of the transition to competition that is underway in the electric industry, and in view of the great uncertainty about the future regulatory and legal framework of the electric utility industry, the use of an 11.25 percent return on capital appears reasonable.

There is great uncertainty about the future regulatory and legal framework of the electric utility industry. Electric utilities face an emerging competitive era. Competitive pressures will come from other utilities attempting to take away customers from the incumbent utility or from customers who threaten to leave the service territory.

Given the uncertainty associated with the future course of restructuring and the uncertainty associated with the extent to which new suppliers may fail to meet their obligations, planning for electric companies will become much more difficult, and thus riskier.

By definition, electric utilities who will be assigned a generic return on total capital as part of their pole attachment rates are those who will no longer be rate-of-return regulated by their state commissions. This means that they will be under some price cap plan or performance-based ratemaking, or both.

The prospects for electric utilities in the future must also be placed in a macroeconomic context. Inflation and the level of interest rates have been remarkably restrained over the past several years. They will not remain so restrained forever. Put simply, the level of interest rates and inflation are at a secular low, but rates of return which will be in existence for several years should not be set based on the bottom-end of the range of reasonableness, but should reflect a broader perspective of the conditions likely to prevail in the future. The Value Line Selection & Opinion of February 14, 1997 projects that their Industrial Composite (an agglomeration of 750 firms) will earn a return

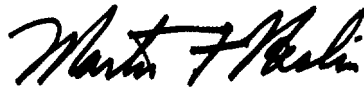
on total capital of 13.0% in 1997 and 13.5% in 1999-2001. In light of those projected returns, providing electric utilities the opportunity to earn an 11.25% return on total capital as part of their pole attachment rate is reasonable.

Conclusion

For the reasons set forth herein, the Commission should implement pole and conduit attachment formulae consistent with Con Edison's concerns and proposals stated in these comments.

Dated: June 25, 1997

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Martin F. Heslin". The signature is fluid and cursive, with the first name "Martin" and last name "Heslin" clearly distinguishable.

Martin F. Heslin

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APPENDIX A

SUMMARY

Quantity of Conduit

Account 366	116,670,791 Feet
Account 369	<u>15,574,952 Feet</u>
Total	132,245,743 Feet

Costs - (Conduit & Manholes)

Account 366	\$1,019,305,238.76
Account 369	<u>\$ 192,500,932.50</u>
Total	\$1,211,806,171.26

Total Costs

Account 366	\$1,206,488,100.51
Account 369	<u>537,860,681.24</u>
Total	\$1,744,348,781.75

% Attributable to Rate	.69
Book Cost per foot of conduit	\$9.16

Account 366

Total Cost	\$1,206,488,100.51
Less (Non Related)	<u>187,182,861.75</u>
Balance (Conduit & Manholes)	\$1,019,305,238.76
% of Account	.84

Quantity of Conduit	116,670,791 feet
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Account 369

Total Cost	\$537,860,681.24
Less (Non Related)	345,359,748.74
Balance (Conduit & Manholes)	\$192,500,932.50
% of Account	.36

Quantity of Conduit	15,574,952 feet
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Account 366

Conduit Book cost	\$8.74
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Account 369

Conduit Book cost	\$12.36
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